IN THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND.

DIRECTOR GENERAL OF RAILROADS *v.* E. W. GATES AND SON CO.
May 26, 1921.

1. **Carriers—Demurrage—Money Charge or Penalty.**—The term demurrage may be used to designate a mere money charge for the use of a car, or a penalty intended by its imposition to prevent any detention of the car.

2. **Penalties—Limitation of Action.**—The duty to pay a penalty for the violation of a legal regulation is a legal obligation not contractual in its nature and the limitation applicable is one year.

The question involved was whether demurrage charges, which increase as time passes, constitute a contract or a penalty. If the decision had been that it is a contract, the limitation would have been three years; if a penalty, one year.

Munford, Hunter, Williams and *Anderson* for plaintiff.

R. L. Montague for defendant.

CRUMP, J. I have considered the interesting arguments submitted, and the authorities cited, in the matter of the plea of the statute of limitations in the case of John Barton Payne, Director-General, etc. *v.* E. W. Gates & Son Co.

The authorities speak at times of demurrage as a mere detention charge for the use of the car, in the nature of a warehouse or terminal charge, and at other times as a penalty. Considering the manner in which the term demurrage was imported into American railroad phraseology, I think it may be and has been used to designate a mere money charge for the use of the car, or to designate a penalty intended by its imposition to prevent any detention of the car and to penalize the consignee, if he does detain it, according as it was intended as the one or the other.

I think it fairly manifest from all the circumstances here that the charge, which the Southern railway was authorized to impose in the present case, was intended to prevent the detention of the car beyond free time and to impose upon the consignee quite a heavy pecuniary payment in case of violation by him of the rule requiring him to return the car at the end of the free time, and was therefore a penalty.

Having reached this conclusion, I feel constrained to follow the ruling of the West Virginia court in Gawthrop *v.* Fairmount Coal Co., 81 S. E. 560, and to hold that the period of limitation in bar of the claim made in this case is one year and not three years.

The duty to pay a penalty for violation of a legal regulation

cannot be said to rest upon a contract express or implied. The duty is in a general legal sense an obligation, but it is an obligation not contractural in its nature nor arising out of a contract express or implied.

I have examined most of the authorities collated by the industry of counsel, and may add Western Union Telegraph Company *v.* Bilisoly, 116 Va. 562, and Myers *v.* Exchange National Bank, L. R. A. (N. S.) 1918A 67.

The issue on the plea of the statute of limitations should therefore be decided in favor of the defendant and judgment ordered accordingly.

Note.

In Gawthorp *v.* Fairmont Coal Co., 74 W. Va. 39, 81 S. E. 560, cited in the principal case, it was held that one year is the period of limitation as to an action for the penalty imposed by W. Va. Code, 1913, sec. 3920, for mining within five feet of a division line. The court said: "We have no period particularly fixed for the bar of statutory penalties, as many jurisdictions have. The question must be answered by our general provisions of limitation. Resort must be had to the following: 'Every personal action for which no limitation is otherwise prescribed, shall be brought within five years next after the right to bring the same shall have accrued, if it be for a matter of such nature, that, in case a party die, it can be brought by or against his representative; and if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued, and not after.'. Code 1913, ch. 104, sec. 12 (Sec. 4425). Now, 'in the absence of express statutory provisions, actions for the recovery of statutory penalties do not survive. The death of either party, plaintiff or defendant, is an incurable abatement.' 1 Cyc. 67. 'A cause of action for the recovery of a penalty does not survive the death of the wrongdoer, being in its nature personal. As to what is a penal action the rule is that where an action is founded entirely upon a statute, and the only object of it is to recover a penalty or forfeiture, it is clearly a penal action.' 1 R. C. L. 47. At common law actions on penal statutes do not survive. Comy's Digest, title Administration, B, 15; Schreiber *v.* Sharpless, 110 U. S. 76, 3 Sup. Ct. 423, 28 L. Ed. 65. It has not been made otherwise with us. So, by the statute which we have quoted above, the matter of this penalty being of such a nature that an action on it does not survive, one year is the limitation for an action thereon. The plea was improperly rejected.

No definite consideration seems to have been given the point in Hall *v.* Railroad Co., 44 W. Va. 36, 28 S. E. 754, 41 L. R. A. 669, 67 Am. St. Rep. 757, wherein it is asserted that five years is the limitation for an action on the penalty there involved, and the remark is a mistaken one."